88-1007

No.

# In The

# Supreme Court of the United States

## October Term 1988

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**ESTELLE LINN,**

*Petitioner,*

*vs.*

**SAMUEL R. PIERCE, JR., Secretary of the Department of Housing & Urban Development,**

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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PUBLISHER'S NOTE

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that a hiring official may limit his consideration of applicants to his personal friends and ignore qualified minority and female applicants?

2. In a subjective hiring situation in which the selecting official considers only his friends and chooses a friend of the same sex and race, do the evidentiary standards of *Watson* v. *Fort Worth Bank and Trust* require a plaintiff to submit applicant statistics to establish disparate impact?

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**STATUTE**

Section 703(a)(2) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(2) . . . . . 5

## OPINIONS OF COURTS BELOW

The September 7, 1988, opinion of the United States Court of Appeals for the Seventh Circuit, the basis for the judgment here sought to be reviewed, was entered as an unpublished order pursuant to Rule 53 of the Rules of the United States Court of Appeals for the Seventh Circuit and is reprinted in the Appendix to this Petition, pp. 1-9. A prior opinion of the United States District Court for the Northern District of Illinois, delivered orally on January 30, 1987, is also unreported and is reprinted in the Appendix, pp. 10-15.

## JURISDICTION

This is a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 7, 1988. The jurisdiction of this Honorable Court is invoked pursuant to Section 1254(1) of the Judicial Code, 28 U.S.C. §1254(1).

## STATUTE INVOLVED

Section 703(a)(2) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(2):

> It shall be an unlawful employment practice for an employer –
>
> * * *
>
> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

## STATEMENT OF THE CASE

The United States Department of Housing and Urban Development ("HUD") is administratively divided into ten geographic regions, each of which is supervised by a Regional Administrator. Each Region has a Regional

Counsel who advises the Regional Administrator and other Regional personnel on legal issues and supervises subordinate attorneys. This case concerns Region V which is headquartered in Chicago, Illinois.

Petitioner Estelle Linn ("Linn"), a white female, graduated from law school and was admitted to the Illinois bar in 1959. After working as a lawyer in the private sector for nearly a decade, she began work in 1969 for HUD's Regional Counsel for Region V. In 1973, when the position of Regional Counsel for Region V became vacant due to a resignation, Linn and Richard Flando ("Flando"), a white male, both applied. When Flando was ultimately selected in 1975, Linn filed an administrative complaint with HUD claiming that she had been discriminated against on the basis of her sex in the selection process.

After her administrative complaint had been pending for many months, Linn filed suit in 1977 in the United States District Court in Chicago against the Secretary of HUD on her charge of discrimination. While that suit was pending, HUD ruled on the administrative complaint, holding that (i) Linn was better qualified than Flando, (ii) the selection procedure had violated HUD's personnel regulations[1] (iii) Linn had been discriminated against on the basis of her sex and (iv) Linn be appointed Regional Counsel for Region V.[2] Before this administrative order could be implemented, however, Flando obtained

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[1] At the time they applied, neither Linn nor Flando had supervisory experience. Flando was "temporarily" assigned the position of Acting Regional Counsel for a period of time far longer than governmental regulations allowed. Thereafter, this period of supervisory experience was impermissibly considered as a basis for selecting Flando.

[2] In its opinion, the Court of Appeals characterized this decision as a "low-level internal HUD administrative finding . . . ." App. at 2. In fact, the decision was rendered by the Assistant Sec-

*(Footnote continued on the following page)*

an injunction preventing his removal from the position of Regional Counsel.[3] Linn was instructed not to intervene in Flando's suit by HUD's office of General Counsel and the government declined to appeal the injunction.

The administrative order and the injunction were totally inconsistent with each other. As a result, for approximately a year Flando remained as Regional Counsel while Linn resided in an administrative limbo. In an effort to break a logjam that was demoralizing to both herself and the staff of the Regional Counsel, Linn accepted an appointment to the lesser position of Area Counsel of the Chicago Area Office of HUD. This agreement was formalized and entered as a consent decree.[4]

For several years thereafter, Linn worked as Area Counsel. During that time, her reviews were uniformly high and, on one occasion, one of her reviewers noted that she ran "one of the strongest area counsel operations in the country." However, in 1983 HUD reorganized its operations and, in the process, abolished the office of Area Counsel for Chicago. Linn was thereby demoted to the position of Associate Regional Counsel, the position she had held prior to her first lawsuit and prior to the entry of the consent decree. During the time that her position was being administratively abolished, Linn suspected that Flando was going to retire from the position of Regional Counsel. Accordingly, she wrote a letter to S. Leigh Curry, the Asso-

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2 *(Continued)*
retary of Fair Housing and Equal Opportunity, the individual to whom the Secretary of HUD had delegated by regulation final authority to decide discrimination complaints. Thus, the Court of Appeals erred in its characterization.

[3] The injunction was obtained from a district judge different from the one assigned to Linn's discrimination case.

[4] The consent decree was signed by the district court presiding over Linn's case on March 17, 1978.

ciate General Counsel of HUD, asking to be appointed to the position of Regional Counsel of Region V should the position become vacant.

Although he was informed of this letter by Curry, John J. Knapp, then HUD's General Counsel, testified that he declined to notify Alfred Moran, the Regional Administrator for Region V, of Linn's interest in the position. When Flando did in fact vacate the position of Regional Counsel in October 1983, Moran, a 35 year old black male, selected Lewis Nixon, a 34 year old black male and Moran's close friend, to be the Regional Counsel. In accordance with HUD regulations, Knapp concurred in this selection.[5] Moran testified that he never considered any other person for the position and, specifically, he never considered Linn.

In response, Linn filed a motion to enforce the 1978 consent decree claiming the abolition of the position of Area Counsel combined with her downgrading to Associate Regional Counsel was a violation of the decree; in addition, she also filed new administrative charges claiming that she had been discriminated against on the basis of her sex and race in the selection of the new Regional Counsel. When no decision was forthcoming on her administrative charges, she filed suit charging sex discrimination. A bench trial was held on both her complaint and her motion to modify the consent decree.

The district court ruled against Linn on both causes, stating in part:

> . . . I cannot find any evidence of discrimination here. All the people who were in that process in Washington said they did not discriminate, they never intended to discriminate, and of course I

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[5] An applicant for the position of Regional Counsel needs the concurrence of both the Regional Administrator and the General Counsel before he can be placed in the position.

> have to take that with a grain of salt, but I can't find any other evidence that causes me to believe in any way that those people, Mr. Curry and Mr. Knapp and others, were trying to prevent Miss Linn from getting this job because of any of the protected categories. App. at 13.

Linn appealed to the United States Court of Appeals for the Seventh Circuit which affirmed the trial court in an unpublished order. It is this order which is sought to be reviewed.

## ARGUMENT

### I.

### The Court of Appeals Erred in Holding That A Hiring Official May Limit His Consideration of Applicants to His Personal Friends and Ignore Qualified Minority and Female Applicants

A key issue raised in this case is whether the hiring practices approved by the Court of Appeals are consistent with the language of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2002e-2(a)(2), which provides:

> It shall be an unlawful employment practice for an employer ... to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities ... because of such individual's ... sex ....

There is no dispute that Linn is qualified to be Regional Counsel and that she applied for the position.[6] Further, it is undisputed that Moran was allowed to restrict his consideration of applicants solely to

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[6] The Court of Appeals noted that the district court found that "Linn had an outstanding record of past performance, has superior knowledge of HUD programs and policies, and is thus well qualified to be Regional Counsel." App. at 5.

his close personal friends. HUD advanced no reason as to why Linn was not considered for the position of Regional Counsel other than to state that Moran had no duty to consider her and that he wished to hire a friend. Finally, it is undisputed that Linn was a middle-aged, white female while Moran was a young, black male.

The Court of Appeals cited a previous decision, *Benzies* v. *Illinois Dept. of Mental Health*, 810 F.2d 146, 148 (7th Cir. 1987), *cert. denied*, 107 S.Ct. 3231 (1987), for the following proposition:

> The trier of fact may find . . . that some less seemly reason – personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules – actually accounts for the decision. Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute. . . . Unless the employer acted for a reason prohibited by the statute, the plaintiff loses.

In the view of the Court of Appeals, so long as the primary intention of the hiring official is to benefit his friend and not specifically to harm minorities or females, a court cannot find the requisite discriminatory intent for a disparate treatment action brought under Title VII. The Court of Appeals stated:

> Here, Linn was treated less favorably not because of an impermissible factor, but rather – at worst – because she was not Moran's friend. App. at 8.

The Court of Appeals has expressly adopted a subjective standard for discriminatory intent that no plaintiff can ever satisfy. Under this standard, if a hiring official testifies that his purely subjective intent was merely to benefit a friend (or exercise a grudge or to engage in random conduct) and not to discriminate against a protected applicant, the applicant cannot succeed. In Linn's view, the Court of Appeals has confused intentional conduct with malevolent conduct. Title VII does more than prohibit conduct which is positively evil; it prohibits intentional con-

duct that denies persons equal employment opportunities because of their sex. In *McNeil* v. *McDonough*, 515 F.Supp. 113, 129 (D.N.J. 1980), *aff'd*, 648 F.2d 178 (3rd Cir. 1981), the court stated:

> The "intent" referred to is not by any means confined to actual, subjective, individual intent of a purposeful nature. It refers to the legal concept of intent which also embraces subconscious and institutional intent as well as intent inferred from purposeful adherence to some direction or course of action even after an invidious discriminatory effect has been shown to follow from what may have been wholly innocent conduct. Equitable concepts carry considerable weight here, for the ancient rule has been that where a course of conduct, innocently undertaken, is shown to invade the rights of others and the fact is brought to the actor's attention, a refusal to alter the course of conduct to accommodate the rights of others will be regarded as deliberate and intentional.
>
> * * *
>
> The legal concept of "intent" is to be distinguished from "motive", as juries in criminal cases are regularly instructed. Forbidden discrimination in employment may be the consequence of the highest and most salutary motives, but the legal "intent", not the motive, is what controls.

In *Furnco Construction Corp.* v. *Waters*, 436 U.S. 567, 579 (1978), this Court stated:

> It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race . . . .

As the instant case makes clear, if the Court of Appeals' standard of "discriminatory intent" is allowed to stand, Title VII will provide protection from discrimination that is far more illusory than real.

## II.

### In a Subjective Hiring Situation in Which the Selecting Official Considers Only His Friends and Chooses a Friend of the Same Sex and Race, the Evidentiary Standards of Watson v. Fort Worth do not Require a Plaintiff to Submit Applicant Statistics to Etablish Disparate Impact

Subsequent to oral argument before the Court of Appeals, this Court issued its decision in *Watson* v. *Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988). In accordance with the Rules of the Court of Appeals for the Seventh Circuit, Linn cited this case as additional authority but was not allowed to present additional argument or comment upon the case.[7] In its order, the Court of Appeals noted that Linn raised the applicability of *Watson* "in passing," and it further noted that of the ten or eleven Regional Counsel appointments approved by Knapp, all but one were males. The Court of Appeals declined to review the case under *Watson*, however, stating that "Linn to her detriment has not presented either population statistics or applicant statistics." App. at 8.

Linn contends that she did introduce sufficient evidence on disparate impact to carry her burden as outlined in *Watson*. She introduced at trial HUD's Multi-Year Affirmative Action Plan for Region V, prepared by Region V's Administrative Division, dealing with affirmative action.[8] The report, which provided a complete breakdown of all employees of Region V by race and sex, concluded that there was "no underrepresentation for black males in all levels of professional and administrative categories." It further concluded that "[w]hite females are underrepre-

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[7] Rule 28(i) of the Rules of the United States Court of Appeals for the Seventh Circuit.

[8] One purpose of the report was to analyze the personnel changes which occurred as a result of the reorganization.

sented at the senior level in the professional category . . ." to an extent that barely exceeded the "severely underrepresented" category. Neither the district court nor the Court of Appeals mentioned this report or its conclusions even though it played a conspicuous part of Linn's arguments before both courts. Further, Moran testified that of the nine supervisory appointments he had made as Regional Counsel, all were male except for his Special Assistant, a young black female. In explaining these numbers, Moran testified that "if memory serves me, in the pool of applicants there were very few – very few – white females." HUD neither presented further evidence on this point nor attempted to establish a business justification for its selection procedure.[9] The Court of Appeals apparently accepted Moran's statement as an adequate statistical defense while rejecting HUD's Multi-Year Affirmative Action Plan as competent evidence to establish disparate impact.

The Court of Appeals has imposed burdens on Linn which neither she nor any other plaintiff can overcome. In a case where hiring officials are given unchecked authority to hire their close personal friends, the relevant "applicant statistics" consist of identifying the sex of those persons with whom Regional Administrators have close personal friendships. How Linn could accomplish this feat defies imagination. If such a task is meaningful, and Linn submits it is not, it should be the task of the employer to identify such an undefined and indefinable pool of "applicants".

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[9] In fact, HUD procedures allow the Regional Administrator to elect to use a merit staffing procedure to fill the position of Regional Counsel. This procedure would have required posting of the vacancy and the prepartion of a list of most qualified candidates. Moran declined to exercise this option.

The full impact of *Watson* on individual discrimination cases is yet to be felt. In Linn's view, *Watson* represents a substantial step forward in eliminating discrimination in such cases; however, if courts are allowed to demand evidence that a plaintiff simply cannot obtain, such as was done below, *Watson* will become an engine of destruction for disparate treatment cases. This case represents an opportunity to demonstrate that *Watson* was a step forward, not backward, in the elimination of invidious discrimination.

WHEREFORE, Petitioner prays that this Honorable Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and review this case.

Respectfully submitted,

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# APPENDIX

# United States Court of Appeals

## For the Seventh Circuit

## Chicago, Illinois 60604

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Argued October 26, 1987

September 7, 1988

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

**ESTELLE LINN,**
*Plaintiff-Appellant,*

**No. 87-1274** *v.*

**SAMUEL R. PIERCE, JR., Secretary of the United States Department of Housing & Urban Development,**
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 7918 and No. 77 C 770

**Paul E. Plunkett,** Judge.

### ORDER

This matter is before the court on two related appeals by plaintiff-appellant Estelle Linn challenging a finding by the district court that defendant-appellee Secretary did not discriminate against her when it did not appoint her to be Regional Counsel. The district court issued oral findings of fact and conclusions of law. See Fed.R.Civ.P. 52(a). The district court's fact findings are not clearly erroneous, and its legal conclusions are correct. We accordingly affirm.

## I.

Linn, a white female born in 1930, graduated from law school and became a member of the Illinois bar in 1959. She began working for the Department of Housing and Urban Development [HUD] in June, 1969.

HUD has its headquarters in Washington, D.C. It divides its operations into ten territories known as Regions. Illinois is in Region V, along with Indiana, Minnesota, Michigan, Ohio and Wisconsin. Region V's headquarters (known as a Regional Office) are in Chicago. Each Region is run by a Regional Administrator. In addition to the Regional Offices, HUD has an Area Office in each state. Each Area Office has jurisdiction over HUD's programs within that state.

HUD's legal staff has a parallel organization. The General Counsel, located in Washington, D.C., is HUD's top lawyer. In the field, each Region has a Regional Counsel and a number of Associate Regional Counsel and supporting attorneys. The Regional Counsel renders legal advice to the Regional Administrator. John Knapp, HUD's General Counsel from 1981 through 1986, testified that among a Regional Counsel's principal responsibilities is assisting the Department of Justice in conducting litigation in which HUD is a party. Tr. 192. In addition, each Area Office has an Area Counsel with supporting attorneys.

In December, 1970, Linn became an Associate Regional Counsel, the same title she holds today. In 1975, not satisfied with her progress along the career track – and in particular after having applied unsuccessfully for the then open job of Regional Counsel – Linn sued HUD for discriminating against her because of her sex, in violation of Title VII, 42 U.S.C. §§ 2000e-5 and 2000e-16. After a low-level internal HUD administrative finding that Linn was more qualified that the Regional Counsel that HUD had selected, her discrimination action was settled

on March 17, 1978, with the entry of a consent judgment with permanent injunction provisions. *Linn v. Harris*, No. 77 C 770 (N.D. Ill. 1977). The consent judgment provided that Linn would be appointed to the position of Area Counsel for HUD's Chicago Area Office and that she would not be fired – or reduced in "rank or pay" – without notice and a hearing.

In 1983, HUD dismantled the Chicago Area Office as part of a national reorganization in which it abolished all Area Offices located in the same city as a Regional Office because they wastefully overlapped. Consequently, HUD abolished the position of Chicago Area Counsel. HUD reassigned Linn to the position of Associate Regional Counsel, which is the title of the position she held prior to the consent judgment's entry.

Linn's lawyer wrote to the office of the General Counsel in Washington to express Linn's interest in becoming Regional Counsel should the position ever become vacant. Then, still in 1983, the position of Regional Counsel became open. The Regional Administrator and the General Counsel jointly appoint the Regional Counsel; the Regional Administrator picks the Regional Counsel, but the General Counsel must approve.

For purposes of this appeal, federal jobs can be divided into the competitive service and the excepted service. 5 U.S.C. §§ 2102(a), 2103(a); 5 C.F.R. §§ 212.101, 213.101. For competitive positions, the government publishes vacancy announcements and hiring and promotion are based upon competitive examinations and "merit staffing." If a position is "merit staffed," an "objective" procedure ranks candidates. A list of those ranked highest is then submitted to the appointing authority. Excepted positions are those which are not competitive and are "excepted" from the competitive requirements. *See generally Hondros v. United States Civil Service Comm'n*, 720 F.2d 278, 280-82 (3rd Cir. 1983).

Excepted positions are designed to be those for which "it is impracticable to examine" (Schedule A, 5 C.F.R. § 213.3101), or those for which "it is not practicable to hold a competitive examination" (Schedule B, 5 C.F.R. § 213.3201), or those which are "of a confidential or policy-determining character" (Schedule C, 5 C.F.R. § 213.3301). HUD's attorney positions were in the excepted service under Schedule A. Thus, HUD was not *required* to announce vacancies for those positions or to hire based on objective merit. The choice whether to do so lay with the Regional Administrator. That is, a Regional Administrator could choose to treat an excepted position as if competitive.

Alfred Moran, HUD's Regional Administrator, chose to leave the position in the excepted service. He then hired Lewis Nixon, as experienced litigator and a friend whom he knew from the days when Nixon was an Assistant United States Attorney and Moran was an intern in the United States Attorney's office in Chicago. Both Moran and Nixon are black males. Moran, who testified that he placed confidence in his friend's litigation experience and judgment, did not entertain any other candidates or compare Nixon's qualifications to anyone else's. Linn had not been notified of any vacancy in the Regional Counsel position.

## II.

On November 2, 1983, plaintiff filed a "Motion for Entry of an Order Modifying Consent Judgment." This motion was apparently filed pursuant to Fed.R.Civ.P. 60 to modify the consent judgment entered in 1977 on the grounds that the Secretary had unilaterally abolished the position awarded to Linn in the consent judgment. We construe this motion as a motion to modify an injunction or alternatively as a motion for civil contempt against the Secretary.

Linn subsequently brought a second action against the Secretary pursuant to Title VII, 42 U.S.C. §§ 2000e-5 and 2000e-16, for discriminating against her based upon age, race and sex in selecting Regional Counsel for Region V. Linn alleged that HUD discriminated against her by not informing her about the Regional Counsel opening and in not considering her. Linn concedes that Moran himself did not discriminate against her in his decision because he did not know that she was interested in the position. Linn sought an order appointing her to the position of Regional Counsel, plus her attorney's fees. She has now abandoned her claims based upon age and race, though that is not essential to our holding.

Both the motion and the new lawsuit were consolidated for a bench trial. At the trial, Linn, Moran, Nixon, General Counsel Knapp, and two other HUD personnel officials all testified.

The parties agreed and the district court held that Title VII governs the hiring of attorneys in the excepted service. The court further found that Linn was qualified to serve as Regional Counsel and that she had applied for the position.

The court next found that Moran had the option to use or not to use merit staffing in appointing Regional Counsel, that sound reasons existed for using either option, and that neither Moran nor any other HUD official abused his discretion in choosing not to use merit staffing either in general or in this case. But the court cautioned that even when competitive selection is not invoked, Title VII still prevents the hiring process from being tainted in any way by discrimination.

The court then found that Linn had an outstanding record of past performance, has superior knowledge of HUD programs and policies, and is thus well qualified to be Regional Counsel. But the court then found that the actual reasons why Nixon was hired was his outstanding expe-

rience in litigation and his friendship with Moran. The court found that making decisions regarding litigation is in large part the focus of the Regional Counsel's work, and in that area Nixon's qualifications are superior to Linn's. The court further held that a protected person is not discriminated against if a hiring official, without discriminatory animus, desires to hire a friend.

The court further found that no discriminatory animus entered into the decision by the General Counsel's office not to notify Linn of the vacancy or into Moran's decision to leave the position in the excepted position. After listening to the witnesses' live testimony, the court stated that it "cannot find any evidence or discrimination here . . . I can't find any other evidence [other than Linn's testimony] that causes me to believe in any way that those people . . . were trying to prevent Miss Linn from getting this job because of any of the protected categories."

After concluding that the consent decree did not entitle Linn to be Regional Counsel when a vacancy occurred, the court entered judgment for the Secretary in the discrimination suit and denied Linn's motion to modify the injunction. Linn appeals.

## III.

When a discrimination suit is tried, as it was here, the question whether the plaintiff made out a prima facie case falls out of the picture . . . and the relevant question is whether the plaintiff proved discrimination." *Washington v. Electrical Joint Apprenticeship & Tr. Comm.*, 845 F.2d 710, 713-14 (7th Cir. 1988). A district court's finding that an employer did not intentionally discriminate against an employee on the basis of sex is a finding of fact. *Andre v. Bendix Corp.*, 841 F.2d 172, 176 (7th Cir. 1988). That finding will not be reversed on appeal unless it is clearly erroneous. *Id.*

Here, as mentioned at the outset, the district court's fact findings that Linn did not prove discrimination are not clearly erroneous, and its legal conclusions are correct. We accordingly affirm its judgment, with the following brief comments.

The parties here agree, and we thus assume, that Title VII governs the excepted service, at least for those positions – such as Regional Counsel – which are listed in Schedule A. The parties disagree, however, what Title VII means in the excepted service. Linn's reply brief states her claim and the legal issue succinctly: "whether a hiring official had to consider a qualified female applicant, if the hiring official had a friend of the same race and sex that he desired to hire." Linn argues than an employer – even when hiring to fill an excepted service position – violates Title VII if it does not hire the best qualified applicant who is in a protected race or sex category. According to Linn, Title VII prohibits a closed selection process and thus requires some reasonable notification to those who might be interested in a position. To paraphrase Linn's argument, Title VII requires that there be reasonable notification of job openings and that the employer select the best qualified applicant. Linn states that this is "a garden variety Title VII case involving whether an employer can refuse even to consider a highly qualified member of a protected class because he desires to hire only a close personal friend."

This court has previously addressed Linn's contentions, albeit adversely to Linn:

> The trier of fact may find . . . that . . . personal or political favoritism . . . actually accounts for the decision. Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute. Unless the employer acted for a reason prohibited by the statute, the plaintiff loses.

*Benzies v. Illinois Dept. of Mental Health*, 810 F.2d 146, 148 (7th Cir. 1987) (citation omitted), *cert. denied*, 107 S.Ct. 3231 (1987).

"The ultimate factual inquiry in this type of Title VII case is whether or not the employer treated some employees less favorably than others because of impermissible factors." *Andre, supra*, 841 F.2d at 175. Here, Linn was treated less favorably not because of an impermissible factor, but rather – at worst – because she was not Moran's friend. The district court did not clearly err in finding that no other applicant, regardless of race or sex, would have been considered by Moran. Moreover, the district court did not clearly err in finding that Moran's explanation that he hired Nixon primarily because of his litigation experience was worthy of credence and not a pretext to favor blacks over whites or men over women. And as the district court stated, there are sound reasons for making the hiring noncompetitive and choosing a known quantity: "[A] general counsel in any organization, and many are chosen from outside, are chosen because of their judgment, that is, their ability to be presented with facts that they may not necessarily know and make judgments based on those facts."

As Linn notes in passing, a subjective practice such as choosing to use and then using noncompetitive selection may also be analyzed under a disparate impact approach. *See Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777, 2786 (1988). Here, however, Linn has not shown that using noncompetitive selection has resulted in any statistical disparities in HUD's work force. The evidence showed that of the 10 or 11 Regional Counsel appointments approved by General Counsel Knapp from 1981 through 1986, all but one were males, and of nine appointments Moran made for supervisory positions, eight were male. But Linn to her detriment has not presented either population statistics or applicant statistics. *Cf. Washington, supra*, 845 F.2d at 712. In contrast, Moran testified that "in that pool of appli-

cants there were very few – very few – white females." Tr. 258. Indeed, Moran was later replaced by a white woman. In addition, Linn has not alleged, all the more proven, that invoking the excepted service caused any statistical disparity. *See Watson, supra*, 108 S.Ct. at 2788-89 (plurality opinion per Justice O'Connor, with the Chief Justice and two Justices concurring, and four Justices concurring in the result).

Finally, HUD did not violate the consent decree when it abolished the position of Chicago Area Counsel and placed Linn in a position in which she reported to the Regional Counsel. And as the district court correctly held, "[t]he consent decree doesn't change this result. The consent decree didn't entitle Miss Linn as a matter of right to be Regional Counsel when and if a vacancy occurred . . . ." Before the reorganization, Linn, as Area Counsel, reported to the Regional Counsel. After the reorganization, she still reported to the Regional Counsel, and her duties and functions were essentially the same. More important, her compensation remained exactly the same, as did her federal grade level. She only complains about the loss of certain prerequisites that went with the job of Area Counsel. This does not fall within the plain meaning of "rank or pay."

For these reasons, and those expressed by the district court, the district court's judgment is

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

**ESTELLE LINN,**
*Plaintiff*
*vs.*
**SAMUEL R. PIERCE, JR., et al.,**
*Defendants.*

Docket No. 84 C 7918

Chicago, Illinois
January 30, 1987
3:30 o'clock, p.m.

**TRANSCRIPT OF PROCEEDINGS**
**BEFORE HONORABLE PAUL E. PLUNKETT**

PRESENT:

For the Plaintiff: MR. PAUL F. STACK
Messrs. Stack & Filpi
Chicago. Illinois

For the Defendant: MR. MARTIN B. LOWERY and
MS. ANN L. WALLACE
Assistant U. S. Attorneys
U. S. Courthouse
Chicago, Illinois

Court Reporter: Joseph R. Betz
Official Court Reporter
U. S. Courthouse
Chicago, Illinois

THE COURT: As I told you, I did not in this short period of time have any more time than to just review my notes and look at the exhibits and make some notes that I am going to read into the record. I may, in the next week, if I have time, write an opinion in the case, but as I told you, I thought it was appropriate that you folks know as soon as I knew what the outcome was to be to tell you what it is.

So these are hardly polished remarks. They are in essence the thought process of a decision maker. So excuse me if they are not well organized.

I start out by saying it was a pleasure to preside over the case because the case was well presented, which, unfortunately, is somewhat unusual in these courts. It was efficiently and well presented, and I thought both sides were terribly well represented by their counsel.

The case that I am dealing with is unusual in one sense in that it has few contested facts.

The first question I will deal with is whether or not Title VII deals with this kind of a selection process where we have a non-merit selection process in an exempt or excepted category.

I find there is literally no question presented by the evidence as to whether this is a merit or non-merit system, in fact, the rules are rather clear that it is optional to use the merit system or not, and the option is given to the Regional Administrator, and there are basically, as far as I can see, good reasons for using either, and there is no abuse of discretion by HUD or anybody else in selecting on occasion a non-merit selection system, the way in which Mr. Nixon was chosen as Regional Counsel.

Mr. Moran had the option to use either and he chose to use a non-merit system, and I don't find anything wrong with that. Mr. Moran's – well, let me go further. I find, as I think I found at the end of the case, that the absence of a

merit selection system does not mean that discrimination can enter into the decisions that are made under a non-merit process.

Title VII in my belief still prevents even a discretionary selection process like this from being tainted in any way by discrimination by any of the officials who use that kind of a process.

Mr. Stack told me in closing argument that really the qualifications of the two were not an issue in the case, and I suppose viewing it in his light they are not, and I will go on further, but I have to pause and comment on the qualification issue.

I have no doubt, and I don't think anybody in this courtroom has any doubts about whether the plaintiff, Miss Estelle Linn, is qualified to serve as a Regional Counsel. Her performance with HUD is not only competent, but in many ways outstanding, and without question she is a person who has, I believe, superior knowledge of all of HUD's programs and the inner workings of HUD and is no doubt a valuable asset to the HUD legal staff, but at the same time I have to say that in selecting a Regional Counsel I agree with the testimony that I heard from Mr. Moran and in part Mr. Nixon that the job of a Regional Counsel is more than simply an intimate knowledge of the workings of the operation; a general counsel in any organization, and many are chosen from outside, are chosen because of their judgment, that is, their ability to be presented with facts that they may not necessarily know and make judgments based on those facts.

That I perceive to be one of the major reasons why Mr. Nixon was hired, because in large part their work is litigation and Mr. Nixon's qualifications in litigation are, as presented by the evidence, truly outstanding.

Thus, in that sense, and only in that sense, Mr. Nixon's qualifications for the job are not only equal to, but in that sense superior to Miss Linn's. Both are assets to the HUD

legal operation, but in the sense of making the decisions on litigation in many ways Mr. Nixon's qualifications are superior.

I suppose in that sense I could say there isn't a prima facie case because McDonnell requires that the person claiming discrimination show his qualifications are greater or equal to the person who was chosen, but I will do as Mr. Stack suggested and consider the second question that is really presented, and that is whether or not there was any discrimination against Miss Linn when she made her desire known, her desire to be general counsel known to Mr. Curry and others in Washington.

The facts do support Miss Linn's contention that she advised Washington of her interest and asked to be actively considered for openings in the Regional Counsel's Office, and the facts also support a finding that her requests were to some extent not put into the stream of things in the hierarchy up there.

The defendants say that they have no duty to notify anybody of an opening and, thus, no duty to notify Miss Linn, and that's true, there is no such duty under the non-merit selection system, but that is really not the issue – the issue is whether or not discrimination entered into their decision not to give her notice, whether or not they had a duty to give her notice, and whether in not bringing her to the attention of other regional administrators they were doing that on some discriminatory basis.

Mr. Stack, I cannot find any evidence of discrimination here. All the people who were in that process in Washington said they did not discriminate, they never intended to discriminate, and of course I have to take that with a grain of salt, but I can't find any other evidence that causes me to believe in any way that those people, Mr. Curry and Mr. Knapp and others, were trying to prevent Miss Linn from getting this job because of any of the protected categories.

I guess I conclude by saying this: Miss Linn's problem as presented in this court is indeed a difficult one because to be a Regional Counsel under a non-merit system when that is used, and I gather it to be used by many of the RAs, she can only be selected by the RA, not by Washington, because they basically approve it, they don't do the original selection process, and she is in the difficult position of working from within and not knowing the RAs in the various places so that she could he recommended by them as time goes on.

But in the last analysis that is really a problem that exists under the system when non-merit selection is used, and while I have some sympathy with that I can't take that sympathy and translate it into a violation of Title VII or anything else.

I find that the consent decree doesn't change this result. The consent decree didn't entitle Miss Linn as a matter of right to be Regional Counsel when and if a vacancy occurred, and I can't do anything with the consent decree.

I make no further findings, but I make a suggestion to HUD, which I perceive is a fine organization staffed by good attorneys, because I have seen nothing but good attorneys through the course of this trial, is that somehow they develop a procedure to deal with this problem.

After all, there is an advantage not only to hiring from without, but to hire from within, because the people who are hired from within, when that is done I think that makes for a better family and makes people realize that you can advance all the way to the top from within, and maybe there can be a system put together in the future, at least I wish Mr. Nixon and those folks in Washington would think about it, where people who are highly qualified and who express an interest and are given the opportunity in these kinds of exempted positions to put an application on file, and when a Regional Counsel's job becomes

available, int ch event that any RA seeks any information, or perhaps even if he doesn't, just advise them of the capable people around the country who are available.

There is no requirement they consider them, but at least there is an opportunity to do that.

I make that suggestion only because, as I think everybody here is, I am concerned about harmony in government agencies and keeping good people. I think everybody here is, I am concerned about harmony in government agencies and keeping good people. I think the people we have in this courtroom are of that type and I hope they all in the future are able to work together, but federal courts, who have a lot of power, don't have that much, and I can't order them to work together. But I do make that suggestion to HUD.

Miss Linn, I know you are disappointed, and, believe me, I try to be very sensitive to discrimination cases, I think they are one of the most important things we do on this bench, but, as well as it was presented, I simply am unable to find discrimination against you.

Accordingly, folks, I will enter an order to that effect, and, as I say, I may try to be a little more precise with an opinion.

Thank you for your presentation.

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## CERTIFICATE

Transcript above certified true and complete.

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